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No. 03-1274

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JUANITA SWEDENBURG, IN HER OWN CAPACITY, *ET AL.*,

Petitioners,

v.

EDWARD D. KELLY, CHAIRMAN OF THE STATE LIQUOR AUTHORITY, DIVISION OF ALCOHOLIC BEVERAGE CONTROL, STATE OF NEW YORK, IN HIS OFFICIAL CAPACITIES, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR PRIVATE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether New York may ban direct shipments of alcoholic beverages from unlicensed, out-of-state suppliers to in-state consumers as an exercise of its authority under the Twenty-first Amendment.

2. If not, whether New York's direct shipping ban or the exceptions to it violate the dormant Commerce Clause or the Privileges and Immunities Clause of Article IV.

PARTIES TO THE PROCEEDINGS

Petitioners, plaintiffs-appellees below, are Juanita Swedenburg, in her own capacity, Juanita Swedenburg, as proprietor of Swedenburg Winery, a Virginia partnership, David Lucas, in his own capacity, David Lucas, as proprietor of The Lucas Winery, a California sole proprietorship, Patrick G. Fitzgerald, Cortes DeRussy, and Robin Brooks. Juanita Swedenburg is a Virginia resident, David Lucas is a California resident, and Patrick G. Fitzgerald, Cortes DeRussy, and Robin Brooks are New York residents.

State respondents, defendants-appellants below, are State of New York officials Edward F. Kelly, Chairman of the State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in his official capacity, and Lawrence J. Gedda and Joseph Zarriello, Commissioners of the New York State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in their official capacities.

Private respondents, intervenor-defendants-appellants below, are Charmer Industries, Inc., Peerless Importers Inc., Premier Beverage Company LLC, and Eber Brothers Wine and Liquor Corp., each a New York-licensed alcoholic beverage wholesaler, Local 2D of the Allied Food and Commercial Workers International Union, a union comprised of commissioned alcoholic beverage salespeople in the New York-metropolitan area, and Metropolitan Package Store Association, Inc., a trade association of New York-licensed alcoholic beverage retailers.

RULE 29.6 STATEMENT

Respondent Charmer Industries, Inc. has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

Respondent Peerless Importers Inc. has one privately held parent corporation, Little Quaker Corp., which owns 100% of Peerless Importers Inc. Quaker Equities Ltd., also privately held, owns 100% of Little Quaker Corp. There is no publicly held company that owns 10% or more of any stock in Peerless Importers Inc.

Respondent Eber Brothers Wine & Liquor Corp. has one privately held parent corporation, Eber Bros. & Co., which owns 100% of Eber Brothers Wine & Liquor Corp. There is no publicly held company that owns 10% or more of any stock in Eber Brothers Wine & Liquor Corp.

Respondent Premier Beverage Company LLC has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

Respondent Metropolitan Package Store Association, Inc. has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

Respondent Local 2D of the Allied Food and Commercial Workers International Union has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

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BRIEF FOR PRIVATE RESPONDENTS

The private respondents respectfully submit that the petition for a writ of certiorari should be granted.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 358 F.3d 223 (2d Cir. 2004). The opinion of the district court granting summary judgment for petitioners (Pet. App. 34a-71a) is reported at 232 F. Supp. 2d 135 (S.D.N.Y. 2002). The order of the district court entering judgment for petitioners (Pet. App. 72a-73a) is not reported.

JURISDICTION

The judgment below was entered on February 12, 2004. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. Shortly after Prohibition's repeal in 1933 by the Twenty-first Amendment, New York enacted its Alcoholic Beverage Control Law ("ABC Law"), N.Y. Alco. Bev. Cont. Law §§ 1 *et seq.* (McKinney 2000 & Supp. 2004). As did most States, New York adopted a "three-tier" regulatory system for distribution of alcoholic beverages. Under this system – the heart of which is found in ABC Law §§ 102(1)(c) and (d) – all alcoholic beverages imported into New York must be shipped to parties licensed by and, thus, accountable to, the State. Specifically, out-of-state producers of alcoholic beverages sell their products to New York-licensed wholesalers, who then sell them to New York-licensed retailers, who, in turn, sell them to in-state consumers. Thus, under New York's ABC Law, unlicensed, out-of-state purveyors of alcohol cannot legally ship their products to consumers located within New York State. In contrast, the ABC Law does permit licensed, in-state wineries to ship alcohol di-

rectly to in-state consumers. These same licenses also are available to out-of-state wineries, provided they establish a presence in New York and comply with its laws.

2. On February 3, 2000, petitioners Juanita Swedenburg and David Lucas, proprietors of wineries located in Virginia and California, respectively, and petitioners Patrick Fitzgerald, Cortes DeRussy, and Robin Brooks, three wine consumers resident in New York, filed suit against three officials from the New York State Liquor Authority – the agency charged with administering and enforcing the ABC Law – in the United States District Court for the Southern District of New York. Petitioners sought a declaration that ABC Law §§ 102(1)(c) and (d) were unconstitutional under the dormant Commerce Clause and the Privileges and Immunities Clause of Article IV because they prohibit unlicensed wineries from shipping their wine products directly to New York consumers, while other provisions of the ABC Law permit licensed, in-state wineries to make such shipments.[1]

Thereafter, private respondents were granted leave to intervene in the action as defendants, and the parties cross-moved for summary judgment. The district court granted petitioners' motion. Pet. App. 34a. Relying on the two-tier analysis used by a number of other federal courts in similar challenges, the district court first found that New York's regime directly discriminated against interstate commerce. *Id.* at 53a-54a. The court then held that New York's ban on direct shipment of out-of-state wine by unlicensed wineries did not "implicate the State's core concerns under the Twenty-

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[1] Petitioners also contended, and both the district court and Second Circuit held, that ABC Law § 102(1)(a) violated the First Amendment insofar as it impermissibly banned out-of-state purveyors of alcoholic beverages from soliciting orders from New York consumers. This issue is not before the Court.

first Amendment" and, thus, the ban was not insulated from invalidation under the dormant Commerce Clause. *Id.* at 59a. The court did not reach petitioners' assertion that New York's law also violated the Privileges and Immunities Clause of Article IV.

After further submissions and oral argument regarding the appropriate remedy for the dormant Commerce Clause violation, the district court entered judgment enjoining the State respondents from enforcing ABC Law §§ 102(1)(c) and (d) with respect to wine. Pet. App. 72a. The district court, however, stayed its judgment pending appeal. *Id.* at 73a.

3. Respondents timely appealed to the Second Circuit, a unanimous panel of which reversed the district court's decision with respect to petitioners' dormant Commerce Clause and Privileges and Immunities Clause claims.

a. The Second Circuit began its analysis by recognizing that "[f]ive other circuits have decided similar cases" recently. *Id.* at 11a & n.6. (citing *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003), *petitions for cert. filed sub noms. Granholm v. Heald*, No. 03-1116 (docketed Feb. 4, 2004), and *Michigan Beer & Wine Wholesalers Ass'n v. Heald*, No. 03-1120 (docketed Feb. 4, 2004); *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003); *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003); *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000)). In each of these cases, plaintiffs challenged a state regulatory scheme that prohibited out-of-state wineries from shipping their wines directly to in-state consumers, but permitted local wineries to make such shipments.

The Second Circuit further recognized that two distinct modes of analysis had developed among the courts in addressing this issue. Under one mode of analysis – applied by the Fourth, Fifth, Sixth, and Eleventh Circuits, and by the district court below – the challenged statute is first examined in the context of the dormant Commerce Clause to determine

whether the statute discriminates against or unduly burdens interstate commerce. Pet. App. 12a. If the statute is found to violate the dormant Commerce Clause, the court then considers whether the statute nevertheless can be "saved" by the Twenty-first Amendment. For the statute to be "saved," it must be found to advance one of the Twenty-first Amendment's "'core concerns.'" *Id.* Applying this two-step approach, these circuit courts, and the district court in this case, struck down the regulatory schemes in question.[2]

Rejecting this mode of analysis as "flawed" because it failed to give proper deference to the authority granted the States by Section 2 of the Twenty-first Amendment, the Second Circuit adopted the approach of the Seventh Circuit in *Bridenbaugh*. *Id.* at 12a-13a ("We adopt this approach acknowledging that only one other circuit court has employed it in a similar case.") (citing *Bridenbaugh*, 227 F.3d 848). This "mode of inquiry considers the scope of the Twenty-first Amendment's grant of authority to the states to determine whether the challenged statute is within the ambit of that authority, such that it is exempted from the effect of the dormant Commerce Clause." *Id.* at 13a.

b. Explaining its focus on the Twenty-first Amendment, the Second Circuit focused first on the "[l]egal [h]istory" of that Amendment. *Id.* at 14a. The court noted that because the States' pre-Prohibition efforts to control the production and consumption of alcohol often conflicted with this Court's dormant Commerce Clause jurisprudence, *see id.* (citing *Bowman v. Chicago & N.W. Ry. Co.*, 125 U.S. 465 (1888); *Leisy v. Hardin*, 135 U.S. 100 (1890)), Congress responded by enacting two statutes designed to expand state power. In

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[2] The Eleventh Circuit in *Bainbridge* reversed the district court's dismissal of such a constitutional challenge to Florida's direct shipping ban and remanded the case for further factfinding.

the Wilson Act, ch. 728, 26 Stat. 313 (1890) (codified at 27 U.S.C. § 121 (2000)), Congress gave States the authority to regulate imported liquor "'*to the same extent and in the same manner* as though such liquids or liquors had been produced in such State or Territory,'" and it provided that such liquor could "'not be exempt [from state regulation] by reason of being introduced therein in original packages or otherwise.'" Pet. App. 14a (quoting 27 U.S.C. § 121) (emphasis in original). Moreover, in the Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913) (codified at 27 U.S.C. § 122 (2000)), Congress prohibited "'the shipment or transportation, in any manner or by any means whatsoever, of any . . . liquor of any kind, from one State . . . into any other State which . . . is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State.'" Pet. App. 15a (quoting 27 U.S.C. § 122) (omissions in original).

The court further noted that the language of Section 2 of the Twenty-first Amendment closely tracked the language of the Wilson and Webb-Kenyon Acts, providing that "'[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof'" is prohibited. *Id.* at 15a-16a (quoting U.S. Const. amend. XXI, § 2). In other words, as the court stated: "Section 2 effectively constitutionalizes most state prohibitions regulating importation, transportation, and distribution of alcoholic beverages from the stream of interstate commerce into the state." *Id.* at 16a.

c. Next, the court engaged in an historical analysis of this Court's Twenty-first Amendment jurisprudence. The court examined both "early" and "contemporary" lines of this Court's cases, and, disagreeing with appellate decisions such as *Heald*, found that *all* of this Court's cases support the proposition that Section 2 of the Twenty-first Amendment grants States the plenary authority to regulate the transportation or importation of alcohol within their borders. Pet. App.

18a-19a, 23a-24a; *id.* at 23a (stating that in each of its contemporary cases this "Court unequivocally reaffirmed the principle that insofar as section 2 [of the Twenty-first Amendment] permits each state to regulate alcohol traffic within its borders it 'primarily created an exception to the normal operation of the Commerce Clause.'" (quoting *Craig v. Boren*, 429 U.S. 190, 206 (1976)).

d. Applying these principles to the challenged statute, the Second Circuit held that "New York's regulatory regime falls squarely within the ambit of section 2's grant of authority." *Id.* at 25a. The court further found that (i) New York's statutory scheme "regulates only the importation and distribution of alcohol in New York," (ii) "New York's prohibition of the sale and shipment of wine by unlicensed wineries directly to New York consumers serves valid regulatory interests," (iii) there was "no indication, based on the facts presented here, that the regulatory scheme is intended to favor local interests over out-of-state interests," (iv) New York's regulatory scheme was not discriminatory because "[a]ll wineries, whether in-state or out-of-state, are permitted to obtain a license as long as the winery establishes a physical presence in the state," and (v) the ABC Law's mandate that all licensees establish a physical presence in the State served valid regulatory functions such as ensuring that those trafficking in alcohol are accountable to the State. *Id.* at 25a-29a.

e. The Second Circuit, finding that New York's regulatory scheme did not discriminate on the basis of residency, then rejected petitioners' claim that, in addition to violating the dormant Commerce Clause, New York's prohibition against direct shipping also ran afoul of the Privileges and Immunities Clause of Article IV. *Id.* at 29a-30a.

f. The Second Circuit thus reversed the district court's grant of summary judgment in favor of petitioners on their dormant Commerce Clause and Privileges and Immunities Clause claims.

ARGUMENT

The petition should be granted because it raises recurrent and important constitutional issues having nationwide ramifications.

Principal among these issues is the scope of the authority granted the States under Section 2 of the Twenty-first Amendment to ban direct shipments of alcohol imports. There is a substantial conflict among the circuits that have addressed this fundamental issue, both as to the mode of analysis and as to the result. The Second and Seventh Circuits, applying the plain language of the Twenty-first Amendment, have upheld state direct shipping bans on alcohol imports. In contrast, the Fourth, Fifth, and Sixth Circuits, first applying a dormant Commerce Clause analysis to such regulations, have struck them down. The Eleventh Circuit, also first applying a dormant Commerce Clause analysis, remanded the case before it for further factfinding to determine whether such a direct shipping ban furthered any legitimate state interests protected by the Twenty-first Amendment. Moreover, those circuit courts that struck down state direct shipping restrictions on "dormant" Commerce Clause grounds failed to address the fact that Congress has affirmatively authorized the States to enact such bans – separate and apart from the rights that States enjoy under the Twenty-first Amendment. Accordingly, there is a compelling need for this Court to review these important issues.

Indeed, this Court now has before it petitions seeking review of the Sixth Circuit's decision striking Michigan's direct shipping ban. *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003), *petitions for cert. filed sub noms. Granholm v. Heald*, No. 03-1116 (docketed Feb. 4, 2004), and *Michigan Beer & Wine Wholesalers Ass'n v. Heald*, No. 03-1120 (docketed Feb. 4, 2004). Although there is a significant degree of overlap in the issues raised by those petitions and by the petition in this case, this case also raises somewhat different issues because under New York law, unlike Michigan law, out-of-

state wineries may obtain licenses to ship their products on the same terms as in-state wineries simply by establishing a presence in the State.[3] Moreover, in reaching their respective holdings, the Second and Sixth Circuits employed different modes of analysis, with the Second Circuit focusing primarily on the Twenty-first Amendment and the Sixth Circuit focusing primarily on the dormant Commerce Clause. For these reasons, this Court's consideration of the related issues raised by all currently pending petitions may be illuminated by reviewing both the Second and Sixth Circuits' judgments in these cases, rather than one or the other. Given the num-

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[3] That factor may be significant in this Court's analysis. Thus, for example, although the Fourth Circuit applied a two-step analysis to invalidate an outright ban coupled with exceptions for in-state wineries, it agreed that a statutory scheme such as New York's that permits out-of-state wineries to obtain licenses allowing them to ship directly to in-state consumers would be constitutional. *See Beskind*, 325 F.3d at 516 ("North Carolina could satisfy its concerns by requiring out-of-state wineries to import their wine into North Carolina to an in-state location and by treating that location in the same manner as it treats in-state winery locations."); *see also* Pet. App. 13a n.7 (stating that "the Fourth Circuit offered a possible nondiscriminatory alternative to North Carolina's statute that is remarkably similar to the New York scheme").

Petitioners assert that "[n]o license is available to out-of-state producers to traffic in alcoholic beverages," but that contention is mistaken. Pet. 2. As the Second Circuit below expressly found: "All wineries, whether in-state or out-of-state, are permitted to obtain a license as long as the winery establishes a physical presence in the state." Pet. App. 25a. "Thus, unlike in other states, out-of-state wineries are permitted to seek and obtain a New York license to distribute and sell alcohol." *Id.* at 8a (footnote omitted); *see also* N.Y. Alco. Bev. Cont. Law §§ 3(37), 76 (Pet. App. 86a-90a), 77(1)-(2), 96, 116; Jt. App. 1564-65, ¶ 43.

ber of issues raised by both judgments – and the number of public and private parties in each case – private respondents respectfully suggest that the Court grant review in both sets of petitions and, rather than consolidate them, set the two cases for argument in tandem.

I. There Is A Substantial Conflict Among The Courts Of Appeals As To The Relationship Between The Twenty-first Amendment And The Dormant Commerce Clause

By its plain language, Section 2 of the Twenty-first Amendment "prohibit[s]" the "transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof." U.S. Const. amend. XXI, § 2. Despite this clear language, the courts of appeals, faced with dormant Commerce Clause challenges to state statutes regulating the importation of alcoholic beverages, have sharply divided on the analytical framework to be employed and have reached starkly different outcomes depending on the methodology applied.[4] Moreover, even among those circuits that have found a constitutional infirmity, there is substantial conflict over the proper remedy: whether to strike a State's entire direct shipping ban or only the limited, in-state exceptions to that law.

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[4] Indeed, since 2000, six Courts of Appeals – those for the Second, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits – have issued decisions involving challenges to state alcoholic beverage control laws that prohibit out-of-state wineries from shipping their wines directly to in-state consumers but permit local wineries to make such shipments. Four of these decisions were handed down within the last year alone.

A. The Second And Seventh Circuits' Mode Of Analysis

The opinion below represents the most recent decision by a federal appeals court addressing state regulation of alcohol imports. In its opinion, the Second Circuit flatly (and correctly) rejected as "flawed" the analysis adopted by the Fourth, Fifth, Sixth, and Eleventh Circuits focusing, in the first instance, on the dormant Commerce Clause "because it has the effect of unnecessarily limiting the authority delegated to the states through the clear and unambiguous language of section 2 [of the Twenty-first Amendment]." Pet. App. 12a-13a (footnote omitted).

Instead, the Second Circuit adopted the approach taken by the Seventh Circuit in *Bridenbaugh*, 227 F.3d 848. This "mode of inquiry considers the scope of the Twenty-first Amendment's grant of authority to the states to determine whether the challenged statute is within the ambit of that authority, such that it is exempted from the effect of the dormant Commerce Clause." *Id.* at 13a.

> The inquiry, in our view, should not allow the protective doctrine of the dormant Commerce Clause to subordinate the plain language of the Twenty-first Amendment. Instead, the inquiry should be sensitive to the manner in which these two constitutional forces interact in light of the impact the Twenty-first Amendment has on dormant Commerce Clause concerns.

Id. at 13a-14a. "Allowing dormant Commerce Clause concerns to restrict state regulatory schemes that focus on the importation of liquor would render section 2 a nullity." *Id.* at 16a.

In *Bridenbaugh*, plaintiffs challenged the constitutionality of an Indiana statutory scheme that prohibited the direct shipment of alcoholic beverages from out-of-state suppliers to in-state consumers. Focusing on the "text and history" of the Twenty-first Amendment, Judge Easterbrook wrote for the Seventh Circuit that the Indiana statute was a valid exercise of that State's plenary power under the Twenty-first Amendment, which directly authorizes States "to control alcohol in ways that it cannot control cheese." 227 F.3d at 851.[5]

> No longer may the dormant commerce clause be read to protect interstate shipments of liquor from regulation; § 2 [of the Twenty-first Amendment] speaks directly to these shipments. Indeed, all "importation" involves shipments from another state or nation. *Every* use of § 2 could be called "discriminatory" in the sense that plaintiffs use that term, because every statute limiting importation leaves intrastate commerce unaffected. If that were the sort of discrimination that lies outside state power, then § 2 would be a dead letter.
>
> No decision of the Supreme Court holds or implies that laws limited to the importation of liquor are problematic under the dormant commerce clause.

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[5] Judge Easterbrook expressly rejected the parties' invitation in *Bridenbaugh* to consider the "'core purposes'" of Section 2 of the Twenty-first Amendment: "If 'core concerns' spelled the difference, we would follow the Supreme Court rather than district courts and student notes. But our guide is the text and history of the Constitution, not the 'purposes' or 'concerns' that may or may not have animated its drafters." *Bridenbaugh*, 227 F.3d at 851.

Id. at 853 (emphasis in original). The Seventh Circuit so held, even though local Indiana wineries, like wineries in New York and some other States, are permitted to ship directly to in-state consumers while their out-of-state counterparts are not. *See id.* at 853 ("holders of Indiana wine wholesaler or retailer permits may deliver directly to consumers' homes"); *id.* at 851 ("Indiana permits local wineries, but not wineries 'in the business of selling . . . in another state or country,' to ship directly to Indiana consumers.") (omission in original).[6]

B. The Fourth, Fifth, Sixth, And Eleventh Circuits' Mode Of Analysis

Notwithstanding the plain language of the Twenty-first Amendment, the Fourth, Fifth, Sixth, and Eleventh Circuits essentially treat alcohol no differently for constitutional purposes than any other product. Presented with a dormant Commerce Clause challenge to a state alcohol importation law, those courts incorrectly applied a two-step analysis.

Those courts began with a traditional dormant Commerce Clause analysis, examining whether the statute in

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[6] Although plaintiffs in *Bridenbaugh* sought review of the Seventh Circuit's decision before this Court, the Court appropriately denied the petition, there being no split among the circuits at the time, and the Seventh Circuit having reached the correct holding after properly applying this Court's precedents. *See Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (2000), *cert. denied sub nom. Bridenbaugh v. Carter*, 532 U.S. 1002 (2001). Review by this Court, however, is now urgently needed given the circuit split that has developed, and widened, since *Bridenbaugh* was decided. Moreover, as explained herein, this petition, together with the petitions in connection with *Heald*, represent the proper vehicles for this Court to resolve the split.

question affects interstate commerce in a manner that either (i) discriminates against interstate commerce, or (ii) imposes burdens on interstate commerce that are incommensurate with putative local gains. *See Heald*, 342 F.3d at 524-25; *Dickerson*, 336 F.3d at 400; *Beskind*, 325 F.3d at 514; *Bainbridge*, 311 F.3d at 1108-09. If such a violation is found, the challenged statute may nonetheless be "saved" by the Twenty-first Amendment, but only if it advances one of the Amendment's "core concerns." *See Heald*, 342 F.3d at 524-26; *Dickerson*, 336 F.3d at 403-07; *Beskind*, 325 F.3d at 513-14; *Bainbridge*, 311 F.3d at 1108.[7]

Applying this two-tier analysis, those courts held that each of the challenged statutes regulating the importation of alcoholic beverages was facially discriminatory in violation of the dormant Commerce Clause. *Heald*, 342 F.3d at 525; *Dickerson*, 336 F.3d at 402-03; *Beskind*, 325 F.3d at 515; *Bainbridge*, 311 F.3d at 1109-11. Moreover, three of these courts held that the challenged statutes were not saved by the Twenty-first Amendment, *Heald*, 342 F.3d at 526-27; *Dickerson*, 336 F.3d at 403-07; *Beskind*, 325 F.3d at 516-17, and the remaining court remanded the case for further fact-finding, *see Bainbridge*, 311 F.3d at 1115-16.

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[7] In *Milton S. Kronheim & Co. v. District of Columbia*, 91 F.3d 193 (D.C. Cir. 1996), the D.C. Circuit, also applying a two-step analysis, found that the District of Columbia's statute at issue (requiring District-licensed wholesalers to store all alcoholic beverages within the District) would have otherwise violated the dormant Commerce Clause but that the statute was saved by the Twenty-first Amendment – even though the legislature operated with a "mixed motive" in enacting it – because the "legitimate state interests" promoted by the statute "fall[] squarely within the state's core enforcement powers over alcohol." *Id.* at 200-04.

1. The Substantial Conflict Among The Fourth, Fifth, Sixth, And Eleventh Circuits Over The Level Of Scrutiny To Be Applied In Connection With The Second Step Of Their Analysis

Although the Fourth, Fifth, Sixth, and Eleventh Circuits agreed that a two-step mode of analysis should apply to the review of a dormant Commerce Clause challenge to a State's ban on direct shipment of alcohol imports, they disagreed on the appropriate level of scrutiny to be applied in connection with the second step of determining whether the Twenty-first Amendment permits the State's actions. Specifically, the Fourth, Fifth, and Sixth Circuits applied a "strict scrutiny" standard typically seen in cases involving restrictions on speech to require the State's action to be "narrowly tailored" to the "least restrictive" alternative necessary to address the State's legitimate concerns. *See Heald*, 342 F.3d at 524-26; *Dickerson*, 336 F.3d at 406; *Beskind*, 325 F.3d at 514-16.[8]

In contrast, the Eleventh Circuit, recognizing that the Twenty-first Amendment mandates that substantial deference be afforded state statutes regulating the importation of alcohol, applied a "far" lower standard. *Bainbridge*, 311 F.3d at 1114 n.17. In the Eleventh Circuit's view, the State "need not show that there are no nondiscriminatory alternatives available." *Id.* Rather, it must demonstrate that its statutory scheme is "closely related" to a core power under the Twenty-first Amendment and not a pretext for mere economic protectionism – a burden that is "far less than the strict scrutiny required under a traditional tier-one [dormant Commerce Clause] analysis." *Id.* at 1106, 1114 n.17; *see also id.* at 1112-15.

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[8] In the decision reversed by the Second Circuit, the district court also applied a "strict scrutiny" standard. Pet. App. 51a-64a.

2. The Substantial Conflict Between The Fourth And Sixth Circuits Over The Proper Remedy Where A Violation Is Found

Although the Fourth and Sixth Circuits agreed on the two-step mode of analysis and the level of scrutiny to be applied in connection with the second step, they disagreed on the proper remedy to be applied where the challenged statute is found to be unconstitutional.

In *Beskind*, plaintiffs challenged the constitutionality of North Carolina's laws prohibiting out-of-state alcohol producers from shipping their products directly to in-state consumers but allowing in-state producers to make such shipments. Unlike New York, North Carolina did not provide a mechanism by which an out-of-state winery could obtain an in-state license that would permit it to ship directly to in-state consumers. *See Beskind*, 325 F.3d at 515. The Fourth Circuit found that "the *combination* of the prohibition of direct shipment and the law permitting local wineries to circumvent [that] prohibition" amounted to a dormant Commerce Clause violation. *Id.* at 518 (emphasis in original). Recognizing that state three-tier systems such as North Carolina's were "long-standing" "scheme[s] authorized by the Twenty-first Amendment," the Fourth Circuit preserved those provisions of North Carolina's regulatory scheme requiring alcoholic beverages to be imported through in-state, licensed parties – provisions enacted shortly after the 1933 repeal of Prohibition – and struck only the more recently enacted provisions allowing in-state producers to ship directly to in-state consumers. *Id.* at 516, 519.[9]

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[9] Even if New York's ABC Law were found to violate the dormant Commerce Clause because it permits licensed, in-state wineries to ship directly to in-state consumers while prohibiting unlicensed, out-of-state wineries from doing so, the only proper

The Sixth Circuit in *Heald* took a different approach. Like North Carolina, Michigan adopted a three-tier system of alcohol distribution shortly after the repeal of Prohibition and, decades later, adopted provisions permitting in-state producers to ship alcohol directly to in-state consumers. Unlike the Fourth Circuit, however, the Sixth Circuit effectively struck Michigan's long-standing three-tier system, and not the subsequently enacted exceptions permitting in-state producers to ship directly to in-state consumers. *See Heald*, 342 F.3d at 527-28.

C. Even Under The Fourth, Fifth, Sixth, And Eleventh Circuits' Mode Of Analysis, New York's Statute Would Be Constitutional Under Both The Dormant Commerce Clause And The Twenty-first Amendment

Even under the two-tier approach adopted by these other circuits, New York's statutory scheme would pass constitutional muster.

Focusing first on the Commerce Clause, New York's statutory scheme would not violate the dormant Commerce Clause. Indeed, the dormant Commerce Clause is not applicable here because Congress has repeatedly exercised its plenary power under the Commerce Clause and expressly au-

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remedy would be that which the Fourth Circuit employed in *Beskind* – that is, to sever and strike New York's in-state delivery exemptions, leaving intact its overall and long-standing prohibition on direct shipping. That is particularly so where, as here, the statute at issue contains a severability clause. *See* N.Y. Alco. Bev. Cont. Law § 161; *Leavitt v. Jane L.*, 518 U.S. 137, 143-44 (1996) (per curiam); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506-07 (1985); *see also McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39-40, 51-52 (1990).

thorized States to pass statutes such as ABC Law § 102.[10] For example, the Webb-Kenyon Act, which was enacted by Congress in 1913, and reenacted without change by Congress in 1935 *after* the end of Prohibition and ratification of the Twenty-first Amendment, is, by its very title, an "[a]n act divesting intoxicating liquors of their interstate character in certain cases." 27 U.S.C. § 122.[11] Moreover, in 2000, Congress, again acting pursuant to its plenary authority under the Commerce Clause, amended the Webb-Kenyon Act to authorize federal court injunctions to enforce state bans on direct shipments of alcohol from unlicensed, out-of-state purveyors to in-state consumers. *See* 27 U.S.C. § 122a (Twenty-first Amendment Enforcement Act, Pub. L. No. 106-386, § 2004, 114 Stat. 1464, 1546 (2000)). Thus, this congres-

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[10] The dormant aspect of the Commerce Clause arises from a negative inference from the constitutional grant to Congress to regulate commerce. U.S. Const. art. I, § 8, cl. 3. The dormant Commerce Clause prohibits state laws that discriminate against or unduly burden interstate commerce *in the absence of express Congressional authorization*. *See General Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997). Thus, it is axiomatic that the dormant Commerce Clause "only operates where the Federal Government has not spoken." *Wardair Canada Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 12 (1986); *accord Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 76 (1993).

[11] In clear and unambiguous terms, the Webb-Kenyon Act provides that the "shipment or transportation . . . of any . . . intoxicating liquor . . . from one State . . . into any other State . . . in violation of any law of such State . . . is prohibited." 27 U.S.C. § 122.

sional authorization precludes application of a dormant Commerce Clause analysis here.[12]

The Fourth, Fifth, Sixth, and Eleventh Circuits nevertheless applied a dormant Commerce Clause analysis to the challenged statutes before them. They all found that those statutes were discriminatory on their face and, thus, virtually *per se* invalid. *Heald*, 342 F.3d at 525; *Dickerson*, 336 F.3d at 402-03; *Beskind*, 325 F.3d at 515; *Bainbridge*, 311 F.3d at 1109-11.

In contrast, the Second Circuit recognized that, far from being facially discriminatory, New York's direct shipping ban applies evenhandedly to all shipments of alcoholic beverages, whether from within or without the State. Pet. App. 8a, 25a; *see also* N.Y. Alco. Bev. Cont. Law § 102(1)(c)-(e) (Pet. App. 80a-82a). Thus, New York's ABC Law is facially neutral. *See Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2d Cir. 2003). Moreover, New York's limited exceptions that authorize licensed, in-state wineries to ship their wines directly to consumers are not discriminatory because, as the Second Circuit recognized, "[a]ll wineries, whether in-state or out-of-state, are permitted to obtain a license as long as the winery establishes a physical presence in

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[12] The Second Circuit below cited this congressional authorization. Pet. App. 15a. In contrast, the Eleventh Circuit rejected this congressional authorization argument on the flawed reasoning that it was a nullity in light of the Twenty-first Amendment's passage, even though this legislation was reenacted thereafter. *Bainbridge*, 311 F.3d at 1110-11. To the extent that other circuits (including the Sixth Circuit in *Heald*) ignored these federal statutes and looked first to the dormant Commerce Clause, they erred because the Twenty-first Amendment and statutes such as the Webb-Kenyon Act preclude application of the dormant Commerce Clause here.

the state." Pet. App. 25a. "Thus, unlike in other states, out-of-state wineries are permitted to seek and obtain a New York license to distribute and sell alcohol. They must, however, comply with the licensing requirements of the ABC Law, including establishing and maintaining a physical presence in New York." *Id.* at 8a (footnote omitted). As the Second Circuit explained in upholding New York's identical cigarette distribution laws, "neither the [s]tatute's closure of a sales channel . . . nor the [s]tatute's delivery exemption discriminates against interstate commerce, facially or otherwise," *Brown & Williamson Tobacco*, 320 F.3d at 210, and the fact that out-of-state suppliers may find it "'unworkable' and 'uneconomic' for them to establish brick-and-mortar outlets in New York . . . is insufficient to establish a discriminatory effect," *id.* at 212 (citing *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127-28 (1978) (stating that "the [Commerce] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations" and that "interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another")).[13]

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[13] Moreover, as even petitioners' experts acknowledged, the New York wine market is "already served by more competition than nearly any other." Jt. App. 851-52. Out-of-state wineries can distribute their products here by using any of New York's more than 200 licensed wholesalers, obtaining their own New York wholesale or winery license, or distributing through a licensed winery. *Id.* at 1459-60, ¶ 57, 1564-66, ¶¶ 43-44. As a result, more than 90% of all wine sold in New York comes from out-of-state. *Id.* at 851-54, 860, 862, 866, 1039-40, 1083-84, 1444-45, ¶¶ 26-27 & n.25. In fact, less than 1% of the wine sold in New York is direct shipped. *Id.* at 1444-46, ¶¶ 26, 28, 3936, ¶ 2, 3938-39, ¶ 10. Indeed, petitioners conceded below that New York's ABC Law

Furthermore, for the reasons previously explained, the Twenty-first Amendment saves New York's statute in any event. Indeed, as this Court has recognized, the States' "legitimate" interests protected by the Twenty-first Amendment include "promoting temperance, ensuring orderly market conditions, and raising revenue." *North Dakota v. United States*, 495 U.S. 423, 432 (1990).[14] Accordingly, under a proper analysis of the Commerce Clause and Twenty-first Amendment issues, New York's system would unquestiona-

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does not affect the "volume" of wine flowing into New York. Pls.' Br. at 33. That acknowledgement is ultimately fatal to their dormant Commerce Clause claim. *See Exxon*, 437 U.S. at 123 (finding that challenged Maryland statute did not burden interstate commerce because it did not affect "the total quantity of . . . products shipped into Maryland").

[14] The ample record below demonstrated that New York's three-tier system furthers all of those "legitimate" state "interests" protected by the Twenty-first Amendment. *Id.* at 432. By its very terms, New York's ABC Law effectuates "the policy of the state" of "fostering and promoting temperance" and "obedience to law." N.Y. Alco. Bev. Cont. Law § 2. It is undisputed here that New York's three-tier system provides an "extremely effective" means of ensuring tax collection, which increases the price to consumers and thereby reduces consumption among all drinkers, especially minors. Jt. App. 1418, ¶ 22, 1525, ¶ 25, 1376-78, ¶¶ 22-28, 867-68, 892-93. Moreover, the stricter a State's regulations regarding the distribution and sale of alcohol within the State, the lower the incidence of binge drinking among both minors and all drinkers. *Id.* at 763-64, ¶¶ 30-37, 1366-67. Conversely, total wine consumption per capita is a whopping 40% higher in States that permit direct shipping than in States such as New York that ban direct shipping of alcohol imports. *Id.* at 763-66, ¶¶ 30-39, 1252-1363, 1368-69.

bly be found constitutional even if this Court were to require examination of both issues.[15]

II. The Fourth, Fifth, Sixth, And Eleventh Circuits Misapply This Court's Twenty-first Amendment Jurisprudence

The Second Circuit's decision below and the Seventh Circuit's decision in *Bridenbaugh* are the only two decisions of the six that properly interpret and apply this Court's Twenty-first Amendment jurisprudence.

From the earliest days of the Twenty-first Amendment, this Court recognized that that Amendment created an exception to the normal operation of the dormant Commerce Clause with respect to alcohol imports. For example, in *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936), a unanimous Court, upholding a California statute that imposed a licensing fee on those seeking to import beer into the State, stated: "The words used [in Section 2 of the Twenty-first Amendment] are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes." *Id.* at 62. Likewise, in *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938), the Court, again unanimously, upheld a Minnesota statute that imposed a maximum alcohol-content requirement on imported liquor, but not on liquor produced within the State, noting that "under the [Twenty-first] amendment, discrimination against imported liquor is permissible although it is not

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[15] As previously explained, the circuits applying this two-tier analysis are themselves split over the level of scrutiny to be applied in reviewing a Commerce Clause challenge to a State's alcohol importation law. There is no support whatsoever in this Court's jurisprudence for a "strict scrutiny" standard in this circumstance. In any event, New York's statute would have to be found constitutional under any of these standards of review.

an incident of reasonable regulation of the liquor traffic." *Id.* at 403 (citing *Young's Market*, 299 U.S. at 62, 63).

The Court reiterated this basic proposition three decades later in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964):

> This Court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders. . . . This view of the scope of the Twenty-first Amendment with respect to a State's power to restrict, regulate, or prevent the traffic and distribution of intoxicants within its borders has remained unquestioned.

Id. at 330 (citing, *inter alia*, *Young's Market*, 299 U.S. at 62).[16]

More recently, in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), a unanimous Court stated: "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Id.* at 110 (striking wine-pricing statute on Sherman Act grounds).[17]

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[16] Although the Court invalidated the statute at issue in *Hostetter* on dormant Commerce Clause grounds, it did so because the alcohol subject to the challenged regulation was not destined for "delivery or use" within the State and, thus, the Twenty-first Amendment was inapplicable. *Hostetter*, 377 U.S. at 325, 332-33.

[17] Other cases by this Court where it expressly recognized the States' power to regulate the importation of alcohol for deliv-

Thus, as the Second Circuit recognized, this Court has repeatedly and "unequivocally reaffirmed the principle that insofar as section 2 permits each state to regulate alcohol traffic within its borders it 'primarily created an exception to the normal operation of the Commerce Clause.'" Pet. App. 23a (quoting *Craig v. Boren*, 429 U.S. 190, 206 (1976)) (footnote omitted).[18] This stands in sharp contrast to the

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ery or use within their borders include: *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939); *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395, 398 (1939); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939); *Carter v. Virginia*, 321 U.S. 131, 137 (1944); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996).

[18] *See also id.* at 23a n.11 ("*Accord, Healy* [*v. Beer Inst., Inc.*, 491 U.S. 324, 342 (1989)] (noting that section 2 authorizes state regulation of intrastate liquor traffic, and thus does not permit state laws that attempt to prescribe prices for out-of-state liquor sales); *Brown-Forman* [*Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 585 (1986)] ("Section 2 of the Twenty-first Amendment . . . speaks only to state regulation of the transportation or importation into any State . . . for delivery or use therein of alcoholic beverages.") (internal quotation marks omitted); *Bacchus*, 468 U.S. at 282 (noting "we have consistently reaffirmed that understanding of the Amendment, repeatedly acknowledging the broad nature of state authority to regulate commerce in intoxicating liquors"); *Midcal*, 445 U.S. at 110 (acknowledging that "[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system" within the state); *Capital Cities Cable, Inc.*, 467 U.S. at 713 (noting that "the core § 2 power" concerns the regulation of alcohol within the state's borders); [*Department of Revenue v.*] *James B. Beam Distilling Co.*, 377 U.S. [341, 344 (1964)] ("[B]y virtue of [section 2 of the Twenty-first

Sixth Circuit, which concluded that Michigan's reliance on this Court's decisions in cases such as *Young's Market* and *Ziffrin* was "disingenuous at best." *Heald*, 342 F.3d at 522.

Moreover, as the Second Circuit explained, the Fourth, Fifth, Sixth, and Eleventh Circuits apparently adopted their two-step analysis based on a misinterpretation of this Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). Pet. App. 22a n.10 (citing *Heald*, 342 F.3d at 523-24; *Dickerson*, 336 F.3d at 400; *Beskind*, 325 F.3d at 514; *Bainbridge*, 311 F.3d at 1108). Striking down a Hawaii law that granted special tax exemptions for locally produced pineapple wine, this Court made clear in *Bacchus* that the test for application of the dormant Commerce Clause to state statutes involving alcoholic beverages rests on "'whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.'" *Bacchus*, 468 U.S. at 275-76 (quoting *Capital Cities Cable, Inc.*, 467 U.S. at 714). A threshold question under this test is what are those "reserved" "powers." The answer is found in the plain language of the Twenty-first Amendment: It reserves to the States the power to regulate the "transportation or importation into any State . . . for delivery or use therein of intoxicating liquors." U.S. Const. amend. XXI, § 2.

Thus, in *Bacchus*, the tax exemption for Hawaiian pineapple wine was struck on dormant Commerce Clause grounds because it was *not at all* related to the State's "reserved" "power" to regulate the "transportation or importa-

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Amendment] a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.") (internal quotation marks omitted); *Idlewild*, 377 U.S. at 330 (same).").

tion" of alcohol in the State. Furthermore, Hawaii did not even seek to justify its tax on temperance or any other ground protected by the Twenty-first Amendment "but instead acknowledge[d] that the purpose was 'to promote a local industry.'" *Id.* at 276 (citation omitted).[19] In contrast, New York's statute challenged here promotes such legitimate state interests as temperance, tax collection, and orderly market conditions and, thus, falls squarely within the State's "reserved" "power" to regulate the "transportation or importation" of alcoholic beverages "for delivery or use" in the State.

Indeed, more recently, in *North Dakota v. United States*, 495 U.S. 423 (1990), this Court upheld the constitutionality of state "three-tier" systems because state laws prohibiting alcohol shipments from out-of-state producers to anyone other than in-state licensed wholesalers "fall within the core of the State's power under the Twenty-first Amendment" to regulate the "transportation or importation" of alcoholic beverages within the State's borders. *Id.* at 431 n.4, 432. The Court expressly ruled that any state exercise within that "core" power is "unquestionably legitimate." *Id.* at 432. It explained:

> [T]he State has "virtually complete control" over the importation and sale of liquor and the structure of the liquor distribution system. The Court has made clear that the States have the power to control ship-

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[19] Even with that concession on Hawaii's part, three Members of this Court believed that Hawaii's statute was within the State's rights under the Twenty-first Amendment. *Bacchus*, 468 U.S. at 279 (Stevens, J., dissenting, joined by Rehnquist, C.J., and O'Connor, J.) (stating that appellants' "Commerce Clause claim is squarely foreclosed by the Twenty-first Amendment to the United States Constitution").

> ments of liquor during their passage through their territory and to take appropriate steps to prevent the unlawful diversion of liquor into their regulated in-trastate markets.

Id. at 431 (quoting *Midcal*, 445 U.S. at 110) (citations omitted). That is because a State's "legitimate" interests protected under the Twenty-first Amendment include "promoting temperance, ensuring orderly market conditions, and raising revenue." *Id.* at 432. As Justice Scalia succinctly put it, the Twenty-first Amendment "empowers" each State "to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler." *Id.* at 447 (Scalia, J., concurring).[20]

III. The Issues Raised By The Petition Are Of Nationwide Importance

The issues raised by the petitions in this case are closely related to the issues raised in the petitions in *Heald*, Nos. 03-1116, 03-1120. These petitions raise issues of nationwide importance, and lower courts, state liquor authorities, and alcoholic beverage suppliers need clear guidance on these issues. Most States have statutes barring out-of-state suppliers from directly shipping alcohol to in-state consumers. *See Heald*, No. 03-1120, Pet. at 15 & n.7. Moreover, in addition to the six States whose alcohol regulatory systems already have been challenged in circuit

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[20] *North Dakota* was a plurality opinion written by Justice Stevens and joined by Chief Justice Rehnquist and Justices White and O'Connor. Justice Scalia concurred in all respects material to the case, making it clearly the majority view. Moreover, every Member of this Court agreed that a State may require all imports intended for residents of the State to go through licensed in-state wholesalers.

courts, four other States are now facing similar challenges to their laws in federal district court actions in Arizona, New Jersey, Ohio, and Rhode Island. *See id.* at 15 & n.8.[21]

These challenges to state alcoholic beverage regulatory systems raise serious federalism concerns. The Twenty-first Amendment, which was ratified in 1933 to repeal Prohibition, was expressly intended to grant States control over the "transportation or importation" of alcohol "for delivery or use" within their borders. In response to this grant of authority, most States adopted three-tier regulatory systems for distribution of alcoholic beverages. These systems, which have been in place for 70 years, are now in jeopardy because some circuit courts have fundamentally misapplied the law regarding the relationship between the Twenty-first Amendment and the dormant Commerce Clause.

Moreover, although there is some overlap between the issues raised by the petitions in *Heald* and by the petition in this case, this case does raise somewhat different issues and, thus, the Court may benefit from having two well-developed factual records before it, each of the cases having been decided on summary judgment. For example, under New York's ABC Law, out-of-state wineries may obtain licenses that would allow them to ship their wines directly to in-state consumers, so long as they establish a physical presence in New York and comply with its laws. In contrast, the Sixth Circuit found that there was no such license available to out-of-state wineries under Michigan's alcoholic beverage control law. *See Heald*, 342 F.3d at 521.[22] In addition, while the

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[21] On March 11, 2004, the plaintiffs in the Arizona action voluntarily dismissed their case and agreed not to refile it until after this Court's decisions regarding this petition and the *Heald* petitions.

[22] Petitioners in *Heald* contend that Michigan does not prevent out-of-state wineries from obtaining a "winemakers" license

Second Circuit found New York's statutory scheme not to be discriminatory, the Sixth Circuit found Michigan's statute discriminatory on its face. *Compare* Pet. App. 25a, 29a, *with Heald*, 342 F.3d at 525. Accordingly, this Court's consideration of the issues raised by all currently pending petitions may be illuminated by reviewing both the Second and Sixth Circuits' judgments in these cases.

Given the number of issues raised by both judgments, the number of public and private parties in each case, and the differences between New York's and Michigan's statutory schemes, private respondents respectfully request that the Court agree to review both cases and set the two cases for argument in tandem.[23]

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that would allow them to ship directly to in-state consumers, provided they establish a physical presence in the State. *Heald*, No. 03-1116, Pet. at 23; No. 03-1120, Pet. at 5 n.2, 10. The Sixth Circuit found otherwise. *See Heald*, 342 F.3d at 521 ("[R]eading a number of provisions in conjunction with each other . . . [a]t present, there is no procedure [in Michigan] whereby an out-of-state retailer or winery can obtain a license or approval to deliver wine directly to Michigan residents.") (internal quotation marks omitted) (second alteration in original); *see also id.* at 525-27.

[23] Although private respondents do not oppose petitioners' request that this Court also review their Article IV Privileges and Immunities Clause claim, private respondents question whether that issue warrants this Court's review at this time. The courts of appeals, other than the Second Circuit below, have not even addressed, let alone split on, the Privileges and Immunities Clause issue. Pet. 24. Indeed, the district court below did not even address that issue. Pet. App. 66a-67a. Thus, while petitioners contend that the Court should review their Privileges and Immunities Clause claim precisely because it is unique to this case, that uniqueness actually makes it less worthy of review at this time. Moreover, because petitioners' Privileges and Immunities Clause

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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claim closely parallels their dormant Commerce Clause claim – a point that petitioners concede (Pet. 25-26) – the Twenty-first Amendment would trump that claim in any event. Finally, none of the petitioners has standing to raise this claim in the first instance. The New York consumer petitioners lack standing because the Privileges and Immunities Clause does not protect citizens from allegedly discriminatory actions taken by the State of which they are citizens. Pet. App. 30a n.14 (citing *Zobel v. Williams*, 457 U.S. 55, 59 n.5 (1982)). The winery petitioners lack standing because, as business entities or sole proprietorships, they are not "citizens" within the meaning of the Privileges and Immunities Clause of Article IV, *see Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177 (1868), *overruled in part on other grounds by United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), and, even if they were, they are not in-state complaining of unequal treatment within the State, *see Saenz v. Roe*, 526 U.S. 489, 500-01 (1999); *Toomer v. Witsell*, 334 U.S. 385, 395 (1948).

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